Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-760

ROBERT LEVINE AND
CHARLOTTE LEVINE,

...Petitioners

V.

ROBERT M. STEIN, JOANNE STEIN, EDWARD S. STEIN,
ARTHUR H. STEIN, BARBARA S. FELDMAN, IULA V. LICHTENBERG,
TRUSTEE JOSEPH GOULD, SUBSTITUTE TRUSTEE
and LEWIS K. KESSER,

...Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	11
CERTIFICATE OF SERVICE	13
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT	14

TABLE OF AUTHORITIES

STATUTES

	Page
Section 55-59 (6), Code of Virginia	4
Section 55-59 (12), Code of Virginia	4
Section 55-58, Code of Virginia	4
Section 55-62, Code of Virginia	5
Section 26-15, Code of Virginia	6
Section 26-16, Code of Virginia	7

CASES

Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed. 2d 556 (1972) 11

Levine v. Stein, 560 F. 2d 1175 (C.A. 4th 1977) 2

Sniadach v. Family Finance Corporation, 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed. 2d 349 (1969) 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No._____

ROBERT LEVINE

and

CHARLOTTE LEVINE,

Petitioners

v.

ROBERT M. STEIN, JOANNE STEIN, EDWARD S. STEIN, ARTHUR H. STEIN, BARBARA S. FELDMAN, IULA V. LICHTENBERG, TRUSTEE JOSEPH GOULD, SUBSTITUTE TRUSTEE AND LEWIS K. KESSER

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR

THE FOURTH CIRCUIT

Petitioners Robert Levine and Charlotte Levine pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is recorded in the case of Levine v. Stein, 560 F. 2d 1175 (C. A. 4th 1977).

JURISDICTION

The date of the judgment of the United States Court of Appeals for the Fourth Circuit was August 30, 1977. No re-hearing was requested. No order was entered granting an extension of time in which to petition for certiorari. The statutory provision believed to confirm this Court's jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

I. Did the United States District Court for the Eastern District of Virginia, Norfolk Division have jurisdiction under 28 U.S.C.A. Section 1331, under the due process clause of the Fourteenth Amendment to the United States

Constitution to determine that the Virginia procedure as applied in this case relating to foreclosure of petitioners real estate by respondents by advertisement violates the due process clause of the Fourteenth Amendment to the United States Constitution?

II. Did the United States District Court have jurisdiction to vacate the judgments obtained against petitioners herein by respondent noteholders?

III. Did the United States District Court have jurisdiction to declare that all of the foreclosure sales mentioned in the complaint on real estate owned by petitioners be declared null and void on the ground that the three foreclosure sales took place by the power of sale given to the trustees in deeds of trust without any provision for a hearing to the Court prior to sale?

STATUTES INVOLVED

The statutes involved are:

1. The due process clause to the Fourteenth Amendment of the United States Constitution.

2. Section 55-59 (6), Code of Virginia to wit:

> "In the event of default in the payment of the debt secured, or any part thereof, at maturity, or in the payment of interest when due, or of the breach of any of the covenants entered into or imposed upon the grantor, then at the request of any beneficiary the trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable and shall take possession of the property and proceed to sell the same at auction at the premises or at such other place in the city or county in which the property or the greater part thereof lies..."

3. Section 55-59 (12), Code of Virginia to wit:

> "The clerk of the court upon admitting to record the deed of such trustee conveying property held in trust shall note a reference to same on the margin of the deed book where the deed or other writing conveying the property to such trustee in trust is recorded, if the same can be found in his office."

4. Section 55-58, Code of Virginia to wit:

> "A deed of trust to secure debts or

indemnify sureties may be in the following form, or to the same effect: "This deed, made the ... day of ..., in the year ..., between ... (the grantor), of the one part, and ... (the trustee), of the other part, witnesseth: that the said ... (the grantor) doth (or do) grant unto the said ... (the trustee), the following property (here describe it): In trust to secure (here describe the debts to be secured or the sureties to be indemnified and insert covenants or any other provisions the parties may agree upon). Witness the following signatures and seals (or signature and seal)." (Code 1919, Section 5166.)"

5. Section 55-62, Code of Virginia to wit:

"Notice of sale under any deed of trust whether the same be in conformity with Section 55-59 or not, in the absence of provision therein requiring other or additional matter, may be substantially in the form following:

Trustee's Sale of

.....
(brief description or identification of property)

In execution of a deed of trust, (name or names of grantor or grantors unless grantor or grantors request in writing that the same be omitted,) dated ..., recorded in the Clerk's Office of the ... court of ... in Deed Book ... page ..., the undersigned trustee will offer for sale

at public auction (a brief description of the property and place of sale (on the ... day of ..., nineteen hundred ..., at ... (ante meridian) (noon) (post meridian,) the property described in such deed.
Terms: (Cash) (....)

.....
Trustee(s)"

6. Section 26-15, Code of Virginia to wit:

"When sale is made under any recorded deed of trust, mortgage or assignment for benefit of creditors, otherwise than under a decree, there shall, within four months after the sale, be returned by the trustee to the commissioner of accounts of the court wherein the instrument was first recorded an account of sale. The commissioner shall state, settle and report to the court an account of the transactions of such trustee, and the same shall be recorded as other fiduciary reports. Any trustee failing to comply with this section shall forfeit his commissions on such sale, unless such commissions are allowed by the court. If the commissioner of accounts of the court wherein an instrument was first recorded is advised in writing by a party in interest that an account as required by this section has not been filed, the commissioner and the court shall proceed against the trustee in like manner and impose like penalties as set forth in Section 26-13, unless such trustee is excused for sufficient reason."

7. Section 26-16, Code of Virginia to wit:

> "Every inventory and account of sales returned under Sections 26-12 and 26-15 shall be recorded by the clerk in what are known as will books, and indexed as required by Section 17-59. (Code 1919, Section 5405.)"

STATEMENT OF THE CASE

The United States District Court entered an order on August 30, 1976 dismissing the complaint of petitioners on the sole ground that it lacked jurisdiction to declare unconstitutional, under the Fourteenth Amendment to the United States Constitution involving the due process clause the Virginia foreclosure statutes, as related to this case, adjudicating that the Virginia statutes do not involve state action to trigger any Fourteenth Amendment claim. The United States Court of Appeals for the Fourth Circuit affirmed.

The complaint alleged jurisdiction under 28 U.S.C.A. Section 1331, under the due process clause of the Fourteenth Amendment to the United States Constitution.

Petitioners borrowed $110,000.00 from

respondents Robert M. Stein, Joanne Stein, Edward S. Stein, Arthur H. Stein and Barbara S. Feldman, evidenced by three promissory notes, secured by three separate deeds of trust, recorded in the Clerk's Office of the Circuit Court of the City of Norfolk, Virginia. Upon default in payment of the interest (15% per annum) the respondent noteholders instructed the trustees under the three deeds of trust to foreclose. Foreclosure sales took place on February 28, 1975, March 30, 1975 and October 21, 1975. Respondent noteholders purchased at foreclosure sales valuable real estate of petitioners known as the Naro Theatre Building and the Frazier Pharmacy property as high bidders in amounts far below the fair market value of the real estate. Their high bid was $11,000.00 for the Naro Theatre property which had a fair market value of at least $180,000.00 at time of foreclosure. Their high bid in the Frazier Pharmacy property was $32,000.00, although at the time of foreclosure

the fair market value was $75,000.00. Prior to the last foreclosure, petitioners offered to pay to respondent noteholders the full amount owed under the three deeds of trust, plus interest in default, plus delinquent taxes, advertising costs and reasonable attorney's fees that might be due under the notes. Respondent noteholders refused.

Petitioners were unsuccessful in their chancery suits in the State Court to set aside the three foreclosure sales. In addition, respondent noteholders obtained a deficiency judgment against petitioners.

REASONS FOR GRANTING THE WRIT

I. There was sufficient state action by the State of Virginia for the United States District Court to take jurisdiction. The common law mortgage does not exist in Virginia. The statutory deed of trust making it mandatory for a trustee to take possession of petitioners' real estate by Section 55-59 (6) together with the statutory forms for a permissible deed of

trust, a permissible notice of sale under the deed of trust involve sufficient state action for the court to take jurisdiction.

Moreover, the other Virginia statutes pertaining to release of deed of trust, the interpretation of meaning of phrases that may be included in a deed of trust, validating conveyances of real property under a deed of trust, construction of deedsrequiring notice by newspaper advertisement, disposition of surplus from trustee's sale after death of grantor, protection of assignees, transferees or endorsees of debts secured on real estate, marginal releases of deeds of trust, filing accounts of trustees under deeds of trust to a Commissioner of Accounts and providing for contempt action against trustees, requiring the Clerk to record every account of a trustee under a deed of trust sale, reveal the extensive state action involved in this case. See Sections 55-66.5, 55-58, 55-60, 55-60.1, 55-61.1, 55-62, 55-63, 55-64, 55-64.1, 55-65, 55-65.1, 55-66, 55-66.1, 55-66.2, 55-66.3,

55-66.4, 55-66.6, 55-66.7, 26-15, 26-16, Code of Virginia.

II. Jurisdiction to grant the prayer of the complaint under the due process clause of the Fourteenth Amendment to the United States Constitution is supported by Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed. 2d 556 (1972); Sniadach v. Family Finance Corporation, 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed. 2d 349 (1969); Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

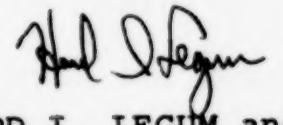
III. Section 55-59 (6), Code of Virginia, as a matter of law violates the holding of Fuentes v. Shevin, supra. The Virginia foreclosure statutes do not provide for a hearing to the court prior to the foreclosure sale. The only avenue of relief by petitioners was in the matter of self-help of seeking injunctive relief to the court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be

granted and that the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed, with the direction for the United States District Court to take jurisdiction and hear the case on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Rule 33, paragraph 3(b), I certify that service was made on respondents Robert M. Stein, Joanne Stein, Edward S. Stein, Arthur H. Stein, Barbara S. Feldman, Iula V. Lichtenberg, Trustee Joseph Gould, Substitute Trustee, by depositing three printed copies of the Petition for Certiorari in a United States mail box, with first class postage prepaid, addressed to T. H. Willcox, Jr., Willcox, Savage, Lawrence, Dickson & Spindle, 1800 Virginia National Bank Building, Norfolk, Virginia, 23510, and to Lewis K. Kesser, 109 Bankers Trust Building, Norfolk, Virginia, 23510, this 28th day of November, 1977.

HOWARD I. LEGUM
Attorney for Petitioner, a member of the bar for the Supreme Court of the United States

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 76-2315

PUBLISHED

Robert Levine and
Charlotte Levine,

Appellants,

v.

Robert M. Stein, Joanne
Stein, Edward S. Stein,
Arthur Stein, Barbara S.
Feldman, Iula V. Lichtenberg,
Trustee, Joseph Gould,
Substitute Trustee, and
Lewis K. Kesser,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

Argued June 7, 1977 Decided August 30, 1977

Before WINTER, RUSSELL and WIDENER, Circuit Judges.

Howard I. Legum (Fine, Fine, Legum and Fine on brief) for Appellants; T. H. Willcox, Jr. (James C. Howell, Willcox, Savage, Lawrence, Dickson & Spindle on brief) for Appellees.

PER CURIAM:

In the district court, plaintiffs sought to have three foreclosure sales declared illegal on the ground that the state statutes under which they were conducted were repugnant to the fourteenth amendment. Although plaintiffs did not assert their federal constitutional claim in the state proceedings, the validity of two of the sales was litigated in the state courts and upheld by the Virginia Supreme Court. The district court dismissed the complaint on the ground that the foreclosure proceedings under the statutes in question did not involve sufficient "state action" to support a claim allegedly arising under the fourteenth amendment. We agree.

The statutes in issue are Section 55-59, Code of Virginia, and Sections 26-15 and 26-16, Code of Virginia. Section 55-59 states that a deed of trust, unless the parties have agreed to the contrary, shall be construed to

impose and confer upon the parties the duties, rights and obligations set forth in the statute, including the right of the trustee, in the event of default in the payment of the principal of the debt or interest thereon, to take possession of the property and sell it at public auction after advertising the proposed sale as provided in the statute. The statute requires no application or intervention of any court or any judicial officer before the sale is conducted or title is vested in the purchaser.

Sections 26-15 and 26-16 relate to sales made under deeds of trust and similar instruments, and they require the trustee, after the sale has been completed, to return an account of sale to the Commissioner of Accounts of the court wherein the instrument is recorded. A trustee who fails to return the account shall forfeit his commissions on the sale and he may be subjected to other penalties, but apparently the validity of the sale remains unaffected

even if the trustee is in default in filing his account. Accounts, when filed, are recorded as public records.

Together with the district court, we think that on the authority of Barrera v. Security Building & Investment Corporation, 519 F.2d 1166 (5 Cir. 1975); Northrip v. Federal National Mortgage Association, 527 F.2d 23 (6 Cir. 1975); and Bryant v. Jefferson Federal Savings and Loan Association, 509 F.2d 511 (D.C. Cir. 1974), the Virginia statutes do not involve sufficient state action to permit the plaintiffs to maintain a cause of action under federal question jurisdiction. The only authority which is cited to the contrary is the decision of a three-judge court in this circuit, Turner v. Blackburn, 389 F.S. 1250 (W.D. N.C. 1975). But for the reasons set forth in Barrera, 519 F.2d at 1170, n.5, we think Turner inapposite because of the differences between the North Carolina statutes with which it was concerned and the Virginia statutes before us in the instant case.

In the light of these conclusions, it is unnecessary for us to consider the defendants' contention that the adverse judgments against plaintiffs in the Virginia courts are res judicata of their federal claims.

A F F I R M E D.

Supreme Court, U. S.
FILED
DEC 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

NO. 77-760

Robert Levine And
Charlotte Levine, *Petitioners*

V.

Robert M. Stein, Joanne Stein, Edward S. Stein,
Arthur H. Stein, Barbara S. Feldman, Iula V. Lichtenberg,
Trustee Joseph Gould, Substitute Trustee and Lewis K. Kesser,
Respondents

PETITION IN OPPITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
Index of Authorities	ii
Opinion Below.	2
Jurisdiction	2
Questions Presented.	2
Statutes Involved.	3
Statement of the Case and Facts.	3
Argument	9
THE VIRGINIA STATUTES RELATING TO DEEDS OF TRUST AND FORECLOSURES THEREUNDER DO NOT CONSTITUTE SUCH "SIGNIFICANT STATE INVOLVEMENT" AS TO INVOKE THE FOURTEENTH AMENDMENT GUARANTEES AND THE JURISDICTION OF FEDERAL COURTS	9
Conclusion	28
Certificate of Service	29

INDEX OF AUTHORITIES

Cases	Page
Adams v. Southern California First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), cert. denied, 419 U.S. 1006 (1974). .	18,21
Angel v. Bullington, 330 U.S. 193 (1947).	10
Barrera v. Security Bldg. & Investment Corp., 519 F.2d 1166 (5th Cir. 1975).	14,17,19,20,22, 24,27
Bell Silver & Copper Mining Co. v. First Nat'l Bank, 156 U.S. 460 (1895)	17
Black v. Cutter Laboratories, 351 U.S. 292 (1956)	20
Bryant v. Jefferson Fed. Sav. & Loan Ass'n. 509 F.2d 511 (D.C. Cir. 1974).	14,17,18,19,27, 28
Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940)	11
Coffey Enter. Realty & Devel. Co. v. Holmes, 233 Ga. 937, 213 S.E.2d 882 (1975)	15
Cromwell v. County of Sac, 94 U.S. 351 (1877).	11
Federal Nat'l Mortgage Ass'n. v. Howlett, 521 S.W.2d 428 (No. 1975).	15,18

Fishgold v. Sullivan Dry Dock & Repair Corp., 328 U.S. 276 (1946).	11
Flynn v. State Bd. of Chiropractic Examiners, 418 F.2d 668 (9th Cir. 1969)	11
Fuentes v. Shevin 407 U.S. 67 (1972)	21
Gibbs v. Titelman, 502 F.2d 1107 (3rd Cir. 1974) .	21
Grubb v. Public Utilities Commission, 281 U.S. 470 (1930). .	11
Hoffman v. H.U.D., 371 F. Supp. 576 (N.D. Tex. 1974)	15
James v. Pinnix, 495 F.2d 206 (5th Cir. 1974) .	21
Kenly v. Miracle Properties, 412 F. Supp. 1072 (D. Ariz. 1976)	15,22,24
Law v. United States Dept. of Agriculture, 366 F. Supp. 1233 (N.D. Ga. 1973).	15
Lawson v. Smith, 402 F. Supp. 851 (N.D. Calif. 1975)	15,20
Leisure Estates of America v. Carmel Development Co., 371 F. Supp. 556 (S.D. Tex. 1974) .	15
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)	13

Northrip v. Federal Nat'l Mortgage Ass'n., 527 F.2d 23 (6th Cir. 1975). 14,19,20,22,27

Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir.), cert. denied, 419 U.S. 1006 (1974) 21

Reitman v. Mulkey, 387 U.S. 369 (1967) 13

Scott v. Paisley, 271 U.S. 632 (1926) 17

Shelley v. Kraemer, 334 U.S. 1 (1948) 13

Shirley v. State National Bank, 493 F.2d 739 (2d Cir. 1974) . . 21

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 21

Turner v. Blackburn, 389 F. Supp. 1250 (W.D. N.C. 1975) 22,24

United States v. Cruikshank, 92 U.S. 542 (1875). 13

U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal. App. 3d 68, 116 Cal. Rptr. 44 (1974). 15,22

Treatises

1B Moore's Federal Practice ¶0.405 [3] (Supp. 1975) 11

Statutes — Page

Section 301, Title 45, District of Columbia 28

Section 26-15, Code of Virginia (1950), as amended. 6,24

Section 26-16, Code of Virginia (1950), as amended. 6,24

Section 55-48, Code of Virginia (1950), as amended. 25

Section 55-55, Code of Virginia (1950), as amended. 26

Section 55-57, Code of Virginia (1950), as amended. 26

Section 55-58, Code of Virginia (1950), as amended. 25

Section 55-60, Code of Virginia (1950), as amended. 25

Section 55-65, Code of Virginia (1950), as amended. 9,26

Section 55-65.1, Code of Virginia (1950), as amended . . 9,26

Section 55-66, Code of Virginia (1950), as amended. 26

Section 55-66.1, Code of Virginia (1950), as amended . . 26

Section 55-66.3, Code of Virginia (1950), as amended . . 9,25

Section 55-66.4, Code of Virginia (1950), as amended . . 26

Section 55-66.5, Code of Virginia (1950), as amended . . 25

Section 55-66.6, Code of Virginia (1950), as amended . . 27

Section 55-67 through 55-79, Code of Virginia (1950), as amended 26

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.

ROBERT LEVINE and
CHARLOTTE LEVINE,

Petitioners,

v.

ROBERT M. STEIN,
JOANNE STEIN,
EDWARD S. STEIN,
ARTHUR H. STEIN,
BARBARA S. FELDMAN,
IULA V. LICHTENBERG, Trustee,
JOSEPH GOULD, Substitute Trustee
and
LEWIS K. KESSER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Now come the Respondents, Robert M. Stein, Joanne Stein, Edward S. Stein,

Arthur H. Stein, Barbara S. Feldman, Iula V. Lichtenberg, Trustee, and Joseph Gould, Substitute Trustee, by counsel, and in opposition to the Petition for Certiorari filed herein state unto this Honorable Court as follows:

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 560 F.2d 1175 (4th Cir. 1977) (Petition, pages 14-19).

JURISDICTION

The jurisdictional requisites are set forth in the Petition at page 2.

QUESTIONS PRESENTED

1. Did the District Court err in dismissing the Complaint herein because of lack of jurisdiction and after Appellants had failed to raise this constitution challenge in three previous appeals to the Virginia Supreme Court.

STATUTES INVOLVED

The pertinent federal and state statutes are set forth in the Petition at pages 3-7.

STATEMENT OF THE CASE AND FACTS

This litigation arises from the foreclosure under deeds of trust of three pieces of real estate in the City of Norfolk, Virginia, known as the NARO Theater Property, Frazier Pharmacy Property, and the Cougar Lounge Property.

There were three deeds of trust, dated March 20, 1974, on three parcels of property securing three notes for $15,000.00, $35,000.00 and $60,000.00, a total of $110,000.00. These deeds of trust were properly recorded in the Clerk's Office of the Circuit Court of the City of Norfolk, the Respondents Stein and Feldman being the noteholders secured thereby.

At appropriate foreclosure sales, conducted in accordance with the terms of the deeds of trust, in February and March, 1975, the NARO Theater and Frazier Pharmacy properties were bought in by the noteholders. Respondent Lewis K. Kesser was the purchaser of the Cougar Lounge realty at its foreclosure sale, properly conducted by the Trustee in August, 1975.

The Steins instituted suit in the Circuit Court of the City of Norfolk for possession of the NARO Theater property purchased by them at the foreclosure sale and were awarded such possession by judgment of that Court on July 10, 1975. The Court in separate actions instituted by Petitioners also determined that the foreclosure sales were legal under Virginia law.

A separate law action was also filed in the Circuit Court of the City

of Norfolk seeking a deficiency judgment for the balance due on the notes after the application of the foreclosure sales proceeds, and a judgment was entered in favor of the Respondents Stein and Feldman in that action.

The Petitioners thereafter appealed to the Virginia Supreme Court the final decrees which had declared the foreclosure sales to be in accordance with Virginia law. Such petitions were denied by the Supreme Court. The decrees of the Circuit Court of the City of Norfolk granting possession of the NARO Theater and Frazier Pharmacy properties have likewise been appealed by the Petitioners and denied. Pending before the Virginia Supreme Court at the time of the District Court proceeding were the deficiency judgment orders entered by the Circuit Court of the City of Norfolk on April 29, 1976, and the

decree of the Circuit Court affirming the legality of the sale of the Cougar Lounge property to Kesser. Both of these petitions for appeal have subsequently been denied, all five suits being thereby disposed of in Respondents' favor by the Virginia Supreme Court.

The Petitioners then filed suit in the United States District Court seeking to have the three foreclosure sales, already declared to be legal and valid by the Circuit Court of the City of Norfolk and affirmed in two (now three) instances by the Virginia Supreme Court, declared illegal under the Fourteenth Amendment of the Constitution of the United States on the ground that Sections 55-59 et seq., 26-15, and 26-16 of the Code of Virginia are unconstitutional, jurisdiction being asserted under 28 U.S.C. §1331 (a).

Sections 26-15 and 26-16 of the

Virginia Code provide that subsequent to a foreclosure sale conducted pursuant to the terms of a deed of trust, the trustee thereunder shall file, within four (4) months, with a commissioner of accounts a sale accounting, which the commissioner audits and reports to the court where it is in turn recorded by the clerk thereof.

This procedure has absolutely no effect upon the validity of the sale and is not a prerequisite to the recordation of the foreclosure deed. Failure to comply with these provisions subjects the trustee to potential forfeiture of his commission and contempt proceedings if reports are not submitted within such time as the court may order. Thus, any defalcations in this respect by the trustee are chargeable solely to him and have no bearing upon the prior foreclosure proceedings.

Virginia Code Section 55-59 merely standardizes the rights and obligations conferred and imposed under deeds of trust unless provisions to the contrary are contained therein. Subparagraph (6) of Section 55-59 also requires, in addition to newspaper advertisement of a sale upon default, that the trustee or secured party provide the owner of the property with written notice of the proposed sale either by personal delivery or certified or registered mail, which notice must be posted at least fourteen (14) days prior to the sale date. There is no contention that Respondents did not comply with the notice and other statutory requirements.

Virginia Code Section 55-60 sets forth certain terms with definitions, which terms may be utilized in deeds of trust in lieu of lengthy recitations of legal clauses and serve to reduce the

complexity of such documents and standardize their contents.

The other Virginia enactments dealing with deeds of trust are generally remedial in nature, construing certain advertising requirements (Section 55-63) and instruments with no maturity date or power of sale (Section 55-61), providing a permissible notice of sale form (Section 55-62), validating certain previous sales (Sections 55-65, 55-65.1, 55-66) and establishing a marginal release system (Section 55-66.3).

THE LAW AND THE ARGUMENT

THE VIRGINIA STATUTES RELATING TO DEEDS OF TRUST AND FORECLOSURE THEREUNDER DO NOT CONSTITUTE SUCH "SIGNIFICANT STATE INVOLVEMENT" AS TO INVOKE THE FOURTEENTH AMENDMENT GUARANTEES AND THE JURISDICTION OF FEDERAL COURTS.

The Complaint filed herein clearly indicates in Paragraphs 4 and 7 thereof that the substance of this action has been litigated in at least five proceed-

ings in the Circuit Court of the City of Norfolk. Of these five, all have been appealed to the Supreme Court of Virginia, and all five appeals have now been denied. It is, therefore, obvious that if the Petitioners desired to challenge the constitutionality of the Virginia foreclosure statute complained of herein, ample opportunity was afforded in these suits. Having chosen to forego the litigation of this issue in the prior state proceedings, they are barred from now resorting to the federal courts for relief.

The United States Supreme Court has long held that a final judgment by a court of competent jurisdiction is res judicata as to the parties thereto, not only as to all matters litigated and determined by such judgment, but also as to all relevant issues which could have been presented. Angel v. Bullington,

330 U.S. 183, 192-93 (1947); Fishgold v. Sullivan Dry Dock & Repair Corp., 328 U.S. 275, 282-83 (1946); Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 378 (1940); Grubb v. Public Utilities Commissions, 281 U.S. 470, 479 (1930); Cromwell v. County of Sac, 94 U.S. 351, 352 (1877). See also 1 B Moore's Federal Practice ¶0.405 [3] (Supp. 1975).

Similarly, it has been held that it is immaterial whether or not constitutional issues were actually litigated in a state court action as "a final judgment on the merits between parties who in law are the same operates as a bar to subsequent action upon the same cause of action, settling not only every issue that was raised, but also every issue that might have been raised in the first action." Flynn v. State Bd. of Chiropractic Examiners, 418 F. 2d 668 (9th

Cir. 1969).

Although leaning toward the view that the prior proceedings were a bar to this litigation and that the Petitioners were ". . . doing nothing here but seeking to use this District Court as an Appellate Court for the Virginia Supreme Court on issues between the same parties . . . ", the lower court, in its Memorandum Order of July 30, 1976, denied the motion to dismiss on the theory of res judicata and indicated its conclusion that lack of jurisdiction was the issue upon which briefs and argument were desired. Objection and exception to this Order were duly noted by Respondents in a letter to the Court on August 4, 1976, with copy to opposing counsel. The Fourth Circuit Court of Appeals did not consider this issue in light of its conclusion as to the lack of jurisdiction.

It is axiomatic that the due-

process shelter of the Fourteenth Amendment encompasses only governmental deprivations of life, liberty or property and adds nothing to the rights of one citizen against another. United States v. Cruikshank, 92 U.S. 542 (1875). The Fourteenth Amendment " . . . erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

To invoke the protection of Fourteenth Amendment due process, some "significant government involvement" must be established in connection with the challenged action. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Reitman v. Mulkey, 387 U.S. 369, 380 (1967).

Prior to the decision of the Fourth Circuit Court of Appeals in this litigation, three federal circuit courts of

appeals had considered constitutional challenges to deed of trust foreclosure procedures upon the claim that such sales, without provision for prior judicial hearings, are deprivations of property without due process and that state statutes recognizing such procedures bring them within the ambit of the Fourteenth Amendment. Of these decisions, all have rejected such contentions, discerning no "significant state involvement." Northrip v. Federal National Mortgage Association, 527 F.2d 23 (6th Cir. 1974), rev'g. 372 F. Supp. 594 (E.D. Mich. 1974); Barrera v. Security Bldg. & Investment Corp., 519 F.2d 1166 (5th Cir. 1975); Bryant v. Jefferson Fed. Sav. & Loan Association, 509 F.2d 511 (D.C. Cir. 1974).

The decision of the Fourth Circuit in this matter did nothing more than to continue this unanimous trend.

The same conclusion was reached in Kenly v. Miracle Properties, 412 F. Supp. 1072 (D. Arix. 1976); Lawson v. Smith, 402 F. Supp. 851 (N.D. Calif. 1975); Leisure Estates of America v. Carmel Development Co., 371 F. Supp. 556 (S.D. Tex. 1974); Hoffman v. H.U.D., 371 F. Supp. 576 (N.D. Tex. 1974); Law v. United States Dept. of Agriculture, 366 F. Supp. 1233 (N.D. Ga. 1973); and by the Supreme Courts of California, Georgia and Missouri. U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal. App. 3d 68, 116 Cal. Rptr. 44 (1974); Coffey Enter. Realty & Devel. Co. v. Holmes, 233 Ga. 937, 213 S.E. 2d 882 (1975); Federal Nat'l Mortgage Ass'n v. Howlett, 521 S.W. 2d 428 (Mo. 1975).

Review of the cases in which challenges to statutes like those in point are considered reveals basically four theories upon which significant state

action is alleged:

(1) the entanglement theory -- challenged actions are so intertwined with governmental policies as to constitute governmental action;

(2) the encouragement theory -- statutes encourage use of the deed of trust;

(3) delegation of public function theory -- foreclosing creditors perform a traditionally governmental function;

(4) direct governmental involvement theory -- participation by state officials in the sale and/or recording procedures constitutes direct governmental action.

In weighing the merits of these asserted indicia of state action, it should be initially noted that the deed of trust as a security instrument with its characteristic power of private sale is of common-law origin and its use in this country dates at least as far back

as 1774. Barrera v. Security Bldg. & Investment Corp., 519 F.2d 1166, 1172 (5th Cir. 1975). The device has been judicially recognized by the United States Supreme Court Bell Silver & Copper Mining Co. v. First National Bank, 156 U.S. 470, 477 (1895), this Court subsequently noting that "[t]he validity of such a contractual power of sale is unquestionable." Scott v. Paisley, 271 U.S. 632, 635 (1926).

The deed of trust is a private contractual arrangement for securement of a debt with the grantor vesting the trustee with a private power of sale upon default, its creation and enforcement being of purely private rather than governmental origin. Bryant v. Jefferson Fed. Sav. & Loan Ass'n., 509 F.2d 511, 513 (D.C. Cir. 1974). "The fact is that the power of sale exercised by the trustee was not derived from the statute

nor granted by the state. It is a contractural right established by the power of sale provision in the deed of trust." Federal Nat'l. Mortgage Ass'n. v. Howlett, 521 S.W.2d at 432.

Thus, there is no entanglement with governmental policies. Enactment of merely regulatory laws cannot thereby bring all private transactions within the accepted definitions of "state action."

> Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept. Bryant v. Jefferson Fed. Sav. & Loan Ass'n., 509 F.2d at 514, citing Adams v. Southern California First National Bank, 492 F.2d 324, 330-31 (9th Cir. 1973), cert. denied, 419 U.S. 1006 (1974).

Nor can statutes, like the Virginia notice and advertisement requirements,

be said to encourage utilization of the deed of trust format. Bryant v. Jefferson Fed. Sav. & Loan Ass'n., 509 F.2d at 514. Rather, such restrictions serve to curb abuses sometimes associated with private sales. Northrip v. Federal National Mortgage Association, 527 F.2d at 27; Barrera v. Security Bldg. & Investment Corp., 519 F.2d at 1171. If anything, such statutes reduce the attraction of the common law deed of trust form through increasing the time and costs of compliance with the statutory requisites.

Such enactments do not unlawfully delegate a public function inasmuch as the private sale power is not a creature of the legislature but has long been an element of the common law. Northrip v. Federal National Mortgage Association, 527 F.2d at 29; Bryant v. Jefferson Fed. Sav. & Loan Association, 509 F.2d at

515.

Lastly, participation by a state official in a ministerial capacity in the sale and/or recordation of the foreclosure deed does not constitute direct state action. Lawson v. Smith, 402 F. Supp. 851, 855 (N.D. Cal. 1975). Nor does state involvement exist merely because the state recognizes the legal effect of private arrangements. Barrera v. Security Bldg. & Investment Corp., 519 F.2d at 1170; Northrip v. Federal National Mortgage Ass'n., 527 F.2d at 28; see also Black v. Cutter Laboratories, 351 U.S. 292 (1956).

The foregoing theories of potential state involvement have also been advanced in analogous challenges to the traditional remedy of self-help repossession of chattels, now codified as Section 9-503 of the Uniform Commercial Code. These arguments have been uniformly and deci-

sively rejected in the circuit courts which have considered them with the Supreme Court denying certiorari in two of such cases. Gibbs v. Titelman, 502 F.2d 1107 (3rd Cir. 1974); Shirley v. State National Bank, 493 F.2d 739 (2d Cir. 1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir.), cert. denied, 419 U.S. 1006 (1974); Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir.), cert. denied, 419 U.S. 1006 (1974).

The Petitioners commend to the Court's attention Fuentes v. Shevin, 407 U.S. 67 (1972), striking down replevin of goods through public officials without a pre-seizure hearing on the underlying claim. However, both Fuentes and the garnishment case of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969),

involved seizure of property through the intervention of some direct arm of governmental authority as opposed to purely private sales conducted pursuant to a similarly private agreement. This critical distinction was noted in Northrip, 527 F.2d at 28-29; Barrera, 519 F.2d at 1170; U.S. Hertz, Inc. v. Niobrara Farms, 51 Cal. App. 3d 68, 116 Cal. Rptr. 44, 56 (1974); and Kenly v. Miracle Properties, 412 F. Supp. at 1074.

In addition, Petitioners cite Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), which struck down North Carolina's statutory procedure for real property mortgage foreclosures. Unlike North Carolina, the Virginia enactments entail no critical role for the clerk of the court. The Blackburn decision deemed significant as evidence of state action the clerk's role in North Carolina in verifying the trustee's report and

administering the upset bid provisions. 389 F. Supp. at 1256. Thus, in that circumstance, the filing of a valid sale report was a necessary precondition to the trustee's power to convey to the highest bidder at the auction. Only the filing of this report triggered the running of the ten-day upset bid period, the lapse of which time without intervention -- as by submission of such a bid -- empowered the trustee to consummate the sale. Furthermore, the administration of the upset bid procedure by the clerk rather than the trustee was deemed to denote state action. Id.

The Virginia statutory process is markedly different from the foregoing. In this state, there is absolutely no upset bid provision nor any discretion vested in the clerks of court whereby they exercise any control over the consummation of the foreclosure sale.

The report filed with a commissioner of accounts by the trustee and ultimately conveyed to the clerk for recordation pursuant to Virginia Code Section 26-15 and 26-16 has no effect upon the foreclosure sale. In fact, it may be lodged with the commissioner up to four months after the sale. The only sanctions for failure to render such a report lie against the trustee and affect neither directly nor indirectly the legality of the sale or the ability of the purchaser to have his deed recorded. The role of the clerk is clearly passive in this regard as with the recordation of any deed.

Thus, the state involvement perceived by the Blackburn court does not exist in Virginia where the clerk's actions are purely ministerial. See Barrera v. Security Bldg. & Investment Corp., 519 F.2d at 1170, n.5; Kenly v.

Miracle Properties, 412 F. Supp. at 1076-77.

Petitioners basic contention is that the Virginia statutes "authorize" or "create" a power of sale in the trustee. Such assertion is completely unfounded, the law simply recognizing the private, common-law contractural right vested in the trustee by the parties.

The purely ministerial marginal release procedure (§§55-66.3 and 55-66.5) cannot constitute state action any more than the recordation of a deed of bargain and sale. In this same vein, the provision of a permissible deed of trust form (§55-58) with interpretations of phrases which may be used therein (§55-60) is no more of an indication of state action than the permissible deed of bargain and sale form in Code §55-48 and the permissible lease form in Code

§55-57 with attendant interpretation of phrases and clauses used therein in Code §§55-67 through 55-79. If Petitioners' position is correct, then every deed and lease utilizing these forms and phrases involves some aspect of state involvement.

As to the validation of certain sales under deeds of trust made prior to June 19, 1934 (§55-65), between 1940 and 1944 (§55-66) and in counties contiguous to first class cities (§55-65.1), the same effort to clear records and settle land titles is reflected in Code §55-55 validating certain sales and leases by county courts.

Code §55-66.1 merely provides a means of marginally noting the assignment or transfer of a deed of trust, again nothing more than ministerially making a public record of a private transaction.

Partial releases (§55-66.4) may be noted marginally as well as complete

releases (§55-66.6), all ministerial actions by the clerk involving no discretion on his part. The fact that the clerk is authorized to collect a fee under Code §55-66.7 can involve no more state action than any other recordation or service fees which the clerk is permitted by law to assess.

By listing every deed of trust statute, Petitioners hope to prove state action by numerosity, but a reading of these statutes clearly brings them within the precedents previously cited. Counsel for the Levines attempts to dismiss the cases cited by the District Court in its opinion by summarily stating that the statutes involved did not "authorize" or "create" the power of sale as do the Virginia enactments. To the contrary, the statutes in Barrera, Northrip and Bryant, supra, recognize such power of sale and provide procedural

regulation thereof just as do the challenged laws here. For example, "Section 301 of Title 45, District of Columbia Code, authorizes the inclusion in mortgages, deeds of trust and other contracts conveying title to realty of clauses granting power to sell secured real property at public auction" (Bryant, 509 F.2d at 512), yet the District of Columbia Court of Appeals specifically held that such provision " . . . creates no power of sale . . . " but merely recognizes a power of sale " . . . created by private consensual agreement." 509 F.2d at 513.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition

for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Brief were mailed, postage prepaid, to Howard I. Legum, counsel for Petitioners, 720 Law Building, Norfolk, Virginia 23510 and

to Respondent Lewis K. Kesser, 109 Bankers Trust Building, Norfolk, Virginia 23510 on this the 27TH day of December, 1977, prior to the filing of same with the Clerk of the Supreme Court.

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